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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-654

STATE OF TENNESSEE ex rel.
OTIS O'DELL, et al.,

Petitioners,

v.

THE CITY OF CHATTANOOGA,
TENNESSEE, et al.,

Respondents.

and

STATE OF TENNESSEE ex rel.
ROBERT J. HICKS, et al.,

Petitioners,

v.

THE CITY OF CHATTANOOGA,
TENNESSEE, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The original opinion of the Supreme Court of Tennessee and its opinion on petition to rehear is reported at 513 S.W.2d 780 (July 29, 1974).

Respondents respectfully submit that no writ of certiorari

should issue to review the judgment of the Supreme Court of the State of Tennessee for the reasons hereinafter set forth.

I. THE JURISDICTIONAL STATEMENT IS FATALLY DEFICIENT.

Respondents would show that both the jurisdictional statement and the statement of the case in the petition are deficient, and not in compliance with Rule 23(f) of this Court. Specifically, the statement of the case at pages five through nine of the petition does not comply with these requirements of Rule 23(f):

> "[the petition shall] specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

Petitioners herein have presented three questions for review. As a point of fact, neither of the first two questions was raised in the court of first instance and, of course, was not passed upon by said court for that reason. A copy of the original complaint in the two actions is enclosed herewith as Appendix A and to show that these issues were not raised. The other original complaint was, in essence, identical except for caption and reference to the areas involved.

Moreover, respondents would show that the petitioners herein never raised the first question presented for review to this Court in the Supreme Court of Tennessee in either their

original answers to respondents' assignment of errors, their petition to rehear (Appendix B), their supplement to the petition to rehear (Appendix C), nor in their application for special leave to file a second petition for rehearing (Appendix D) nor at any time.

Further, as to the second question presented for review, petitioners never raised this question until they filed a supplemental brief and argument in support of their petition to rehear in the Supreme Court of Tennessee.

With respect to the third question presented for review, petitioners did raise the Fourteenth Amendment issue in the trial court in section nine of their original complaint, although never raising any issue under the Fifteenth Amendment herein asserted. Petitioners, however, never preserved their rights to further consideration on this question by taking a cross appeal to the Supreme Court of Tennessee, by mentioning the same in their replies to any of respondents' pleadings in the Supreme Court of Tennessee, nor in any other way bringing this matter before the Supreme Court of Tennessee for its consideration.

Thus, the petition fails to show that "the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." Rule 23(f). It has, of course, been held that this court cannot decide issues, such as the first question presented for review in the instant petition, which are raised for the first time on review of the state court decision. *Tacon* v. *State of Arizona*, 410 U.S. 351, 93 S.Ct. 998, 35 L.Ed.2d 346. *Cardinale* v. *Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed. 2d 398.

Secondly, the second question presented for review, not having been presented to the Tennessee courts until the supplement to the petition for rehearing, was not seasonably presented to the Tennessee courts and, therefore, should not be decided by this court. *Hanson* v. *Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283, rehearing denied *Lewis* v. *Hanson*, 358 U.S. 858, 79 S.Ct. 10, 3 L.Ed.2d 92, rehearing

denied 358 U.S. 858, 79 S.Ct. 10, 3 L.Ed.2d 92, conformed to 106 S.2d 549.

Finally, as to the third question presented for review, two of the original plaintiffs did raise the issue in the original complaint. However, this issue was stricken by the Circuit Court, and certain plaintiffs to whom it was pertinent did not perfect an appeal upon being dismissed from the lawsuit and are not participating in this petition. Moreover, when the case was taken to the Tennessee Supreme Court, none of the remaining original plaintiffs relied on this issue, nor did anyone at any time call it to the attention of the Supreme Court of Tennessee. Under the law of Tennessee, the appellee is also permitted to file assignments of error in cases such as this (*General Truck Sales, Inc.* v. *Batey*, — Tenn.App. —, 494 S.W.2d 130; *Nance* v. *Winebarger*, 32 Tenn.App. 229, 222 S.W.2d 231), but they failed to do so in this case. Since the Tennessee Supreme Court did not pass on the question now urged, and since it was not presented to that court for decision, it should not be considered here. *Congress of Industrial Organizations* v. *McAdory*, 325 U.S. 472, 65 S.Ct. 1395, 89 L.Ed. 1741 (and cases cited therein).

Thus, because the questions presented for review by the petitioner were not properly presented to the courts below, it is respectfully submitted that the petition for certiorari should be denied.

II. THE WRIT SHOULD BE DENIED BECAUSE NO ISSUE WAS DECIDED INCORRECTLY UNDER THE APPLICABLE DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS AND THE LAW OF THE LAND.

Petitioners herein have raised three Questions Presented for Review, which are as follows:

1. Whether petitioners were deprived of their rights to due process of law and the equal protection of the laws under the Fourteenth Amendment to the United States Constitution

by the Supreme Court of Tennessee in its adoption of a "fairly debatable" test when, as applied by the said Court, diminishes the role intended by the Tennessee Legislature of a trial judge in an annexation proceeding and in effect nullifies the legislative right of petitioners to contest the validity of an annexation ordinance.

2. Whether T.C.A. § 6-309, annexation by ordinance, violates the one-man, one-vote principle and is, therefore, unconstitutional in violation of the Fourteenth Amendment to the United States Constitution.

3. Whether the petitioners' rights to due process of law under the Fourteenth Amendment to the United States Constitution and their rights under the Fifteenth Amendment to the United States Constitution were violated when they were denied the right to offer evidence of a preconceived and unconstitutional plan to dilute the voice and influence of the black citizens within the City of Chattanooga.

As demonstrated in Section I of this Brief, none of these issues were timely presented to the Supreme Court of Tennessee, but even assuming they were, there is nothing in the decisions of the courts below which either implicitly or explicitly is in conflict with any decision of this Court.

A. The First Question Presented for Review.

Petitioner contends, in substance, that the Tennessee Supreme Court's interpretation of a Tennessee statute is not what the Tennessee Legislature intended, and, therefore, their rights to due process of law and equal protection of the laws have been violated.

Aside from the fact that petitioners herein never raised this issue in any of the courts below, and no evidence was ever introduced as to the intent of the legislature, it is submitted that this contention fails to state a substantial federal question. This Court held, in *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151:

"Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and *the territory over which they shall be exercised rests in the absolute discretion of the state.* Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the federal constitution. The state, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, *expand or contract the territorial area,* unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. *All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protests. In all these respects the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. . . .*" (Emphasis supplied.)

Traditionally, in Tennessee, changing the boundaries of governmental subdivisions has been considered a legislative, as opposed to judicial function. *Town of Oneida* v. *Pearson Hardwood Flooring Co.*, 169 Tenn. 449, 88 S.W.2d 988. Prior to the Constitutional Amendment of 1953 (Art. XI, Section 9, of the Tennessee Constitution) and the passage of Tennessee Code Annotated § 6-301, et seq., in 1955, the Legislature could, with an unfettered hand, change the boundaries of the state's municipal corporations. By the general act of 1955, which has been codified as Tennessee Code Annotated § 6-309, et seq., the legislature delegated its powers to municipal corporations, which were thereby empowered to annex by ordinance, as has been done in the case at bar. As was pointed out in *State ex.*

rel. Bastnagel v. *City of Memphis*, 224 Tenn. 514, 457 S.W.2d 532 (1970), "the Legislature then could have delegated to the municipalties the authority to annex with no right of judicial review absent constitutional restraint." But the legislature, by the same act, conferred upon the courts jurisdiction to hear quo warranto actions brought by "any aggrieved owner of property lying within territory which is the subject of an annexation ordinance." This right is the exclusive right of judicial review, which the property owners "would not otherwise have had."

The pertinent part of Tennessee Code Annotated § 6-310 provides:

> "Suit or suits, shall be tried on an issue to be made up there, and *the question shall be whether the proposed annexation be or be not unreasonable in consideration of the health, safety and welfare of the citizens and property owners of the territory sought to be annexed and the citizens and property owners of the municipality.* Should the court find the ordinance to be unreasonable, an order shall be issued vacating the same. In the absence of such finding an order shall be isued sustaining the validity of such ordinance, with shall then become operative thirty-one (31) days after judgment is entered unless an abrogating appeal has been taken therefrom." (Emphasis supplied.)

The question of "reasonableness" first came before the Tennessee Supreme Court in the case of *Morton* v. *Johnson City*, 206 Tenn. 411, 333 S.W.2d 924. The Court therein resolved this issue as follows:

> "After many days of studying this record, reading various and sundry authorities, those cited in the briefs and others, we have concluded that the reasons set forth by the Supreme Court of Missouri in the case of *City of St. Joseph* v. *Hankinson*, decided in 1958, reported in 312 S.W.2d 4, 8, concisely, logically and correctly determined. . . . .

"In the Missouri case, in reference to this question, that court had this to say:

> "• • • the court does not, in any sense, substitute its discretion or judgment as to the advisability or propriety of the annexation for that of the legislative body of the city, and that it does not review the legislative discretion; its consideration of 'reasonableness' is confined to a determination of whether there exists a sufficient showing of reasonableness to make that question, at the least, *a fairly debatable one; if there is such, then the discretion of the legislative body is conclusive.* Citing authorities. (Emphasis ours.)

"The function of our courts, historically, has been merely to determine, in the light of these principles, whether the exercise of legislative powers *has been arbitrary and clearly unreasonable.* (See the cases just cited.) *Only to this extent do our courts consider the reasonableness of an annexation.* (Emphasis ours.)

"And further that Court had this to say as to our powers under these annexation cases, that the part that the court plays is, to decide whether the legislative declaration by the city is so palpably unreasonable and unnecessary as to be arbitrary and oppressive exercise of its legislative power. With this reasoning of the Missouri Court we wholeheartedly agree and hold that this is the reasoning that should apply and which we adopt as applying in these annexation cases. The same principles exactly are gathered from White v. City of Glasgow, supra, and what we quoted from this Kentucky case. After studying and reading annexation cases from States all over the Union we have concluded that the principles above enunciated are the ones that are applicable to the instant lawsuit under annexation by the City.

"For years this Court has applied a similar and unrelated reasoning to acts of the Legislature. See Cosmopolitan Life Ins. Co. v. Northington, etc., 201 Tenn. 541, 300 S.W.2d 911, and cases therein cited. In this case we held that where the Legislature has enacted legislation on the

basis of facts and things known to the Legislature that the courts will not inquire into the policy of the Legislature but will only determine whether or not there was a plausable reason for enacting such legislation, and that we will not examine a question de novo and overrule the judgment of the Legislature by substituting our judgment for it unless it clearly appears that the regulations enacted by the Legislature are beyond all reasonable relation to the subject to which they are applied as to amount to merely arbitrary usurpation of power, or they are unmistakably and palpably in excess of legislative power, or they are arbitrary beyond possible justice and that if any state of facts can be reasonably conceived that would sustain legislation in enacting an Act, an Act will be assumed to have existed when the law is enacted, and one attacking this classification of the act must bear the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

"We see no reason of why such reasoning is not applicable to a legislative act of the City Council when it is vested with the authority and power to legislate by an act of the Legislature. The authors of 37 American Jurisprudence, Page 645, Section 28 thereof, say that the power to annex 'is exclusively a legislative power,' and 'in the exercise of that power great latitude must necessarily be accorded to the legislative discretion, and every reasonable presumption in favor of the validity of its action must be indulged. The courts cannot call into question the wisdom or expediency of the legislative determination.'"

This construction of "reasonableness" (i.e., that the Court's "consideration of 'reasonableness' is confined to a determination of whether there exists a sufficient showing of reasonableness to make that question, at the least, *a fairly debatable one; if there is such, then the discretion of the legislative body is conclusive.*") has been consistently adopted by our courts ever since it was first enunciated. *State ex rel. Cathey* v. *City of Knoxville*, 211 Tenn. 304, 364 S.W.2d 912 (1962); *State ex rel. Robbins* v. *City of Jackson*, 218 Tenn. 322, 403 S.W.2d 304

(1966); *State ex rel. Cope* v. *Mayor and Aldermen of Town of Morristown,* 218 Tenn. 593, 404 S.W.2d 798 (1966); and *State ex rel. Balsinger* v. *Town of Madisonville,* 222 Tenn. 272, 435 S.W.2d 803 (1968).

Perhaps most persuasive is that this Court itself has adopted the same test as it regards the reasonableness of ordinances. In *Gant* v. *Oklahoma City,* 298 U.S. 98, 77 L.Ed. 1058, 53 S.Ct. 530, this Court held:

> "Whether the judgment of the common council of the city in the present case was wise, or whether the requirement will produce hardship in particular instances, are matters with which this court has nothing to do. It is impossible for us to say that the provisions of the ordinance are clearly arbitrary and unreasonable. If there be room for fair debate, this court 'will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.' Zahn v. Board of Public Works, 274 U. S. 325, 328, 7 L. ed. 1074, 1076, 47 S. Ct. 594; Standard Oil Co. v. Maryville, 279 U. S 582, 584, 73 L. ed. 856, 859, 49 S.Ct. 430." [1]

Indeed, it has long been well established in the law that statutes or ordinances are presumed valid, and those attacking them must bear the burden of showing them to be invalid.[2]

Further, under *Hunter, supra,* the states may change municipal boundaries "with or without the consent of the citizens, or even against their protests." This being true, it would logically seem that their is no endemic due process right to judicially con-

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[1] For further authority that this is the prevailing law, see 16 Am. Jur.2d 473, Constitutional Law § 225.

[2] *Goldblatt* v. *Town of Hempstead, New York,* 369 U.S. 590, 8 L.Ed. 2d 130, 82 S.Ct. 987; *Erie R. Co.* v. *Williams,* 233 U.S. 685, 58 L.Ed. 1155, 34 S.Ct. 761, affg. 199 N.Y. 525, 92 N.E. 1084; *Ogden* v. *Saunders,* 12 Wheat 213, 6 L.Ed. 606; *Brown* v. *Maryland,* 12 Wheat 419, 6 L.Ed. 681.

test an annexation, absent legislative authority.[3] This being true, the remedy adopted by the state legislature, as interpreted by the highest court of the state, should be upheld, since it is not unreasonable or arbitrary and the procedure adopted satisfies the constitutional requirements of reasonable notice and opportunity to be heard.[4]

Petitioners' basis for a writ of certiorari is that the Tennessee Supreme Court's holding is erroneous under state law. This contention is clearly erroneous. Not only was there no error in the decision, but also, it was directly held in *Hunter, supra*:

> "We have nothing to do with the interpretation of the Constitution of the State and the conformity of the enactment of the assembly to that Constitution; those questions are for the consideration of the courts of the state, and their decision of them is final."

Hence, it is respectfully submitted that the first question presented for review does not present such a substantial question of federal law as to justify this Court granting a writ of certiorari.

B. The Second Question Presented for Review.

Petitioners' second question presented is that Tennessee Code Annotated § 6-309 violates the one-man, one-vote principle and, therefore, violates the Fourteenth Amendment.

The argument could only have a efficacy if residents of the annexed area were denied the vote after becoming residents of the City. This has not been alleged, nor is it, in fact, true. Petitioners' essential underlying contention is that residents of an area being annexed have a federal constitutional right to

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[3] *See International Harvester Co. v. Kansas City*, 308 F.2d 35 (C.A. 10, 1962), cert. den. 371 U.S. 948, 83 S.Ct. 503, 9 L.Ed.2d 498.

[4] *See Hardware Dealers' Mutual Fire Ins. Co.* v. *Glidden Co.*, 384 U.S. 151, 158, 52 S.Ct. 69, 71, 76 L.Ed. 214.

vote on the annexation. This argument is foreclosed by that language in *Hunter, supra,* which provides that a state may extend the territorial area of its municipalities "with or without the consent of the citizens, or even against their protests."

This very issue has recently been decided adversely to petitioners' position. In *Adams* v. *City of Colorado Springs,* 308 F.Supp. 1397, aff. 399 U.S. 901, 90 S.Ct. 2197, 26 L.Ed.2d 555, reh. den. 400 U.S. 855, 91 S.Ct. 25, 27 L.Ed.2d 93, it was held:

> "We must also recognize that there is no absolute constitutional right under the *due process* clause of the Fourteenth Amendment to vote on proposed annexation. *See Sailors* v. *Board of Ed., etc.,* 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967); *Hunter* v. *City of Pittsburgh,* 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907)."

Also to this effect is *State ex rel. Hudson* v. *City of Chattanooga,* 512 S.W.2d 555, cert. den. U.S.S.Ct. December 16, 1974. There can, of course, be no equal protection abuse here, because, under Tennessee law, no referendum is held on annexation, so that these petitioners are being treated equally with everyone else.

Hence, it is respectfully submitted that the second question presented for review is without merit.

C. The Third Question Presented for Review.

Petitioners' third question presented for review is essentially that their rights to due process were violated because they were refused the right to offer evidence that the annexation's motivation was to dilute the influence of the black citizens within the City.

Of course, as demonstrated in Section I of this Brief, this issue was never presented to the Supreme Court of Tennessee and, therefore, does not warrant the granting of a writ of certiorari. Further, no appeal was ever taken by the two black citizens of the City on whose behalf this issue was raised. Moreover, these two black persons were not residents of the area being annexed.

Respondents deny, therefore, that the issue is properly before the Court, but, on the assumption that it were, would show that it is, likewise, without merit.

Respondents take the position that the allegation in the original complaint was a spurious attempt to enflame the possions of the jury petitioners demanded, and, as such, was properly stricken by the trial court. This attempt is demonstrated by the fact that the allegation in the complaint attacked the passage of the ordinance, not on the basis of its effect, if any, on the black community, but on the basis of respondents' motivations, and reasons for enacting the ordinance. Axiomatically, this was improper, and the trial court was eminently correct in striking such language, because it has long been the law of Tennessee, as well as the general rule across the country, that the courts will not inquire into the motives that prompted the exercise of a discretionary power of a municipal legislative body, except where allegations of fraud or bad faith are made. *Cash & Carry Lumber Co.* v. *Olgiati*, 215 Tenn. 287, 385 S.W. 2d 115; *Brumley* v. *Town of Greenville*, 38 Tenn.App. 322, 274 S.W.2d 12; McQuillin, *Municipal Corporations*, 3rd Ed. (1966 Revised Volume), Vol. 2, Section 10.35, p. 830, et seq. Again, if petitioners thought this rule unjust either in its origin or as applied, they should have brought it to the attention of the Tennessee Supreme Court.

The trial court's decision to strike this allegation of the complaint is strengthened by the holding in *State of Tennessee ex rel. Bastnagel* v. *City of Memphis, supra,* that the procedure of Tennessee Code Annotated § 6-310 is the *exclusive* remedy granted persons seeking to contest annexation. Said statute clearly confines the right of action to citizens and residents of the annexed area.

The Tennessee Supreme Court has further held this statute to mean that non-residents of and persons not owning property in the area to be annexed have no standing to bring an action. *City of Gallatin* v. *City of Hendersonville*, 510 S.W.2d 507. Thus, the trial court's decision in dismissing the residents of the

City who alleged no ownership of property in the area to be annexed was clearly correct.

The trial judge who heard this case and the Supreme Court of Tennessee both found that the annexation by the City was prompted by the conditions in the area being annexed and its need for City services. These conditions are set forth in detail at 513 S.W.2d 782. They have absolutely nothing to do whatsoever with race and constitute a valid, adequate, constitutional state ground for the annexation.

It is, therefore, respectfully submitted that petitioners' third ground for review is without merit.

CONCLUSION

Petitioners herein have failed to show that the federal questions they now seek to raise have been timely and properly raised so as to give this Court jurisdiction to review the judgment by writ of certiorari. Further, even had the questions they have presented for review been timely raised, no substantial federal question has been raised which has been decided adversely to any decision of this Court, other federal courts, or the law of the land.

It is, therefore, respectfully submitted that no writ of certiorari should issue.

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APPENDIX A

IN THE CIRCUIT COURT OF

HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE, EX REL, ROBERT J. HICKS ROY F. HARTMAN MRS. A. M. CAGLE A. M. CAGLE NAPOLEON ALEXANDER, JR. CHARLES E. ANDERSON JOHN H. BARRETT BEATRICE ALLGOOD DORIS C. HICKS ALBERT B. HICKS HUBERT McNABB MRS. HUBBARD F. DAVIS W. T. BURGESS REALTORS, v. CITY OF CHATTANOOGA, ROBERT KIRK WALKER, MAYOR, ET AL, and DAVID M. PACK, EX REL, ATTORNEY GENERAL OF THE STATE OF TENNESSEE, DEFENDANTS,	No. N 16199

COMPLAINT

Comes now the relators named in the caption and respectfully show to the Court as follows:

I

This suit in the nature of a Quo Warranto is filed pursuant to TENNESSEE CODE ANNOTATED, 6-310, to contest the validity of certain ordinances of the City of Chattanooga

designated as Ordinance No. 6393, which purports to annex to the City of Chattanooga an area lying west of the present city boundaries, commonly referred to as Wauhatchie, and identified on the defendants' Study Area Boundaries may as Area 12; and Ordinance No. 6394, purporting to provide a plan of taxation for the said Area 12 annexed by Ordinance No. 6393. True and exact copies of said ordinances are attached hereto as Exhibit A and B, and are hereby adopted and made a part hereof as fully and completely as though specifically copied herein, but not for copy.

The relators named in the caption are citizens and property owners within said Area 12 and the City of Chattanooga.

II

Relators aver that the motive behind the annexation of Area 12 or Wauhatchie by the defendants is something other than to prevent the material retardation of the prosperity of the City of Chattanooga and Area 12, and further that the defendants have in reality made no determination that the safety and welfare of the inhabitants and property of the City of Chattanooga and Area 12 is in danger unless annexed by the defendants. Relators aver that the two reasons for the defendant's actions in passing said ordinances were to raise additional revenues for the City of Chattanooga and to dilute the growing influence of the black citizenry within the present boundaries of the City of Chattanooga.

III

That said Ordinance No. 6393, which purports to annex Area 12 to the present corporate limits of Chattanooga states:

> "WHEREAS, after such public hearing and investigation by the Board of Commissioners and its representatives, it now appears that the prosperity of the territory herein described, and as described in said Notice, and the municipality, will be materially retarded, and the safety and welfare of the inhabitants and prosperity of this city

and the herein described territory will be endangered if such area is not annexed;"

Realtors aver that any finding by the defendants that the municipality or Area 12 would be materially retarded and the safety and welfare of its inhabitants and property would be endangered if such area is not annexed, based upon the so-called public hearing as cited in said ordinance, is erroneous and constitutes an arbitrary and oppressive exercise of powers delegated to the City of Chattanooga by the Tennessee Legislature. Further, relators must assume that the investigation referred to in said ordinance hereinabove set out must be in reference to the fringe area study prepared by Hensley-Schmidt, Inc., exclusively for the City of Chattanooga and paid for by the already overburdened taxpayers of the City of Chattanooga. Relators aver that the defendants have not even followed the recommendations made in the Hensley-Schmidt, Inc., report. Relators aver therefore that any attempt by the defendants to justify the annexation of Area 12 on facts discovered at the so-called public hearing, or because of recommendations made by Hensley-Schmidt, Inc., which defendants have not followed, is a fraud upon the citizens and property owners of the City of Chattanooga and Area 12 and is an abuse of its delegated legislative powers.

IV

Relators would show to the Court that the prosperity of the City of Chattanooga and Area 12 will not be materially retarded and the safety and welfare of the inhabitants and property thereof endangered if such annexation does not take place, and therefore, Ordinances 6393 and 6394 are unreasonable and the passing of said ordinances is a further abuse of the defendants' delegated legislative powers.

V

That the annexation of Area 12 by the defendants reasonably may not be deemed necessary for the welfare of the

residents and property owners of Area 12 and the City of Chattanooga as a whole and so constitutes an exercise of power not conferred by law.

VI

Relators aver that the notice given by defendants of a public hearing was defective and did not comply with TENNESSEE CODE ANNOTATED, 6-308 or 6-309; that said notice included a confusing and erroneous boundary description of Area 12 and that many people included in said Area 12 were unaware of their inclusion. Further, the defendants did not conduct the so-called public hearing in accordance with the intent of the Tennessee Legislature to have a public hearing for the purpose of ascertaining information helpful in determining whether or not the prosperity of a municipality and territory proposed to be annexed will be materially retarded and the safety and welfare of the inhabitants and property thereof endangered.

VII

That Area 12 includes many acres of land used purely for agricultural purposes, which is neither necessary for building or for the population of Chattanooga or Area 12. Further Area 12 includes Williams Island with no means of ingress or egress, except by boat or barge, and the purpose of its annexation defies the imagination of reasonable men except for providing additional property tax revenues for the defendants. That the annexation of Williams Island and many, many other acres of agricultural land located in Area 12 has nothing whatsoever to do with the health, safety, and welfare of the citizens and property owners of Chattanooga or Area 12. That said agricultural land is owned by some of the relators herein and is not held by them for sale or use as residential lots and the inclusion of said land by the defendants for annexation is unreasonable and again constitutes an abuse of the defendants' delegated powers and an exercise of power not conferred by law.

VIII

Relators aver that one reason for the annexation of Area 12 to Chattanooga by the defendants was to secure additional revenue for the City of Chattanooga and as such is not a legitimate reason for said annexation and is contrary to the intent of the Tennessee State Legislature in passing Section 6-309 of the TENNESSEE CODE ANNOTATED, and further does not support the alleged finding by the defendants that Area 12 will be materially retarded and the safety and welfare of its inhabitants and property endangered. Relators further aver that this illegal exercise of power by the defendants constitutes a violation of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution and is thereby unconstitutional.

IX

Relators further aver that the second reason for the defendants' arbitrary and unreasonable annexation of Area 12 was to carry out a preconceived plan designed solely to dilute the voice and influence of the black citizens and property owners within the present boundaries of the City of Chattanooga by extending its boundaries to include an area marked by its absence of any black residents, and that as such said annexation ordinance discriminates against the black citizenry of the City of Chattanooga and constitutes a violation of the privileges and immunities, due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

X

That the said ordinances violate the Fifth Amendment to the United States Constitution.

XI

That the proposed annexation is unreasonable because it creates an unfair and unreasonable financial burden on both

the citizens living within the presently incorporated City of Chattanooga as well as the citizens in the areas to be annexed by the ordinances heretofore referred.

XII

That the boundary description for Area 12 is incorrect; that defendants and Hensley-Schmidt, Inc., were advised of errors in said description prior to the third and final reading of Ordinances 6393 and 6394, but took no steps to correct said description. That said description incorrectly describes a point therein as being the northeast corner of the property now or formerly owned by Carl J. Johnson. That said point is not the northeast corner and that said description from that point on is incorrect, confusing and in fact does not make any sense at all. That as a result of said description and its publication thereof, many citizens and property owners living in Area 12 were and still are unaware of their inclusion in the defendants' annexation of Area 12. Relators aver that Ordinances No. 6393 and 6394 are null and void and unreasonable because they purport to annex and provide a plan of services for an area incorrectly described and confusing to the citizens and property owners of Area 12. Relators aver that said ordinances do not annex the area they purport to because of the faulty and incorrect boundary description, and said ordinances are thereby invalid.

XIII

That prior to the passage of the ordinances No. 6393 and 6394, the defendant adopted Resolution No. 9166 purporting to adopt a plan of services setting forth the identification and the projected timing of municipal services proposed to be extended by the City of Chattanooga into Area 12 proposed to be annexed to said city. That authority for the adoption of said plan of services is based on Chapter 420 of the TENNESSEE PUBLIC ACTS OF 1971, a copy of which is attached hereto as Exhibit C and is hereby adopted and made a part

hereof as fully and completely as though specifically copied herein, but not for copy. That prior to the adoption of said Resolution No. 9166, complaint for declaratory judgment was filed by the Hamilton County Judge and the County Council seeking to have said Chapter 420 of the 1971 TENNESSEE PUBLIC ACTS declared unconstitutional and in violation of Article 2, Section 9, of the Constitution of the State of Tennessee. That said complaint for declaratory judgment is pending in the Chancery Court of Hamilton County, Tennessee, and no final adjudication of the constitutionality of said public act has been made. Relators aver, therefore, that the hearing of this cause should be delayed until after a final adjudication by the Tennessee Supreme Court has been made regarding the constitutionality of Chapter 420 of the 1971 TENNESSEE PUBLIC ACTS. Relators aver that to do so otherwise would seriously jeopardize their right to fairly and equitably litigate the reasonableness or unreasonableness of the proposed annexation of Area 12. Further, that in the event said Chapter 420 is declared unconstitutional, the defendants have made no provision for an alternate reasonable plan of services for said Area 12. Relators further aver that the defendants have acted arbitrarily and abused their delegated legislative powers by passing ordinances unreasonable on their face purporting to annex Area 12 by a method of which its constitutionality has not been determined.

PREMISES CONSIDERED, complainants pray:

1. That proper process issue and be served on the defendants requiring them to answer this complaint, but oath to their answer is waived.

2. That this Honorable Court declare that Ordinances No. 6393 and No. 6394 were illegally enacted by the defendants and are unreasonable and invalid, and that the Court enter a decree vacating the same.

3. That the Court postpone a hearing in this matter until after a final adjudication by the Tennessee Supreme Court

adjudging the constitutionality or unconstitutionality of Chapter 420 of the 1971 TENNESSEE PUBLIC ACTS.

4. That the Court render a judgment on the constitutional questions raised in this complaint.

5. That a Jury try the issues of fact in this cause.

6. That complainants have such other, further, and general relief as is just.

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COFFEY, SUMMITT AND O'NEAL

BY: THOMAS H. O'NEAL, Attorneys

for Relators

808 MACLELLAN BUILDING
CHATTANOOGA, TENNESSEE 37402

IN THE CIRCUIT COURT OF
HAMILTON COUNTY, TENNESSEE
DIVISON No. ————

No. N-16199

STATE OF TENNESSEE, EX REL,
ROBERT J. HICKS, et al.,

v.

CITY OF CHATTANOOGA, et al.

MOTION

Come the plaintiffs, through their attorney, and move the Court to permit them to amend their complaint by adding the following paragraph at the end of Paragraph XIII:

> That TCA 6-309 requires that before any territory more than one-fourth square mile in area, or having a population of more than 500 persons, may be annexed under TCA 6-309, the governing body of the municipality shall adopt a plan of service setting forth at a minimum the identification and projected timing of municipal services proposed to be extended into the territory proposed to be annexed. Said section further provides that before any such plan of service shall be adopted it must have been submitted to the local planning commission for study and a writtten report to be rendered within 90 days after such submission unless by resolution of the governing body a longer period is allowed. Plaintiffs aver that the plan of service adopted for Wauhatchie or Area 12 by the defendant, City of Chattanooga, was a schedule of services based strictly upon Chapter 420 of the 1971 Tennessee Public Acts (Variable Tax Act), which on December 18, 1972, was found to be unconstitutional by

the Tennessee Supreme Court. Further, this plan was the only plan of services submitted to the Chattanooga-Hamilton County Regional Planning Commission and was the only one considered by them and reported on by them.

Plaintiffs further aver that in the report of Marble Hensley updating the fringe area study for the City of Chattanooga, he stated that in the event Chapter 420 of the Public Acts of 1971 which allows the use of a variable tax rate, shall be unconstitutional then the City of Chattanooga shall request its consultant to prepare a plan of services under the act of 1955 as soon as practical. Plaintiffs aver that no such request was ever made by defendant and now that the Variable Tax Act is unconstitutional there is no legally adopted plan or schedule of services and, therefore, a basic requirement of TCA 6-309 has not been satisfied and the ordinance annexing Area 12 by the City of Chattanooga is not in compliance with TCA 6-309 and is, therefore, invalid.

In addition, plaintiffs respectfully request this Court to allow another amendment to its complaint by adding the following paragraph:

XIV

That Ordinance No. 6393 annexing Area 12 to the City of Chattanooga included a reference to a plan of services adopted by the defendant, City of Chattanooga, which plan of services was adopted by defendant in its Resolution No. 9166, which resolution provided for a specific plan of services based upon the now unconstitutional Variable Tax Act. Said resolution further provides that if Chapter 420 of the Public Acts of 1971 should be declared invalid or otherwise not applicable so that separate ad valorem taxes may not be levied and collected for services actually rendered said territory, then all services will be rendered to the territory as soon as practical, immediately in some instances but not later than the plan of services set out. Plaintiffs aver that this

language is vague and indefinite and violates the due process clause of the United States Constitution. Since the Variable Tax Act was declared unconstitutional, there is in reality no plan of services and the plaintiffs are left only with the catch-all reference by the defendant that all services will be rendered to the territory as soon as practical immediately in some instances, but not later than the plan of services set out. Plaintiffs aver that this language violates basic statutory law which requires a statute to be definite to be valid. Plaintiffs aver that if defendant is attempting to rely on the plan of services based on the Variable Tax Act as its present plan of services then due to the unconstitutionality of the Variable Tax Act, which therefore results in full taxation to the residents on the effective date of annexation, the said plan of services is unreasonable on its fact and the annexation of Area 12 based upon such a plan of services is unreasonable and invalid.

COFFEY AND O'NEAL

By: THOMAS H. O'NEAL,
Attorney for Plaintiffs,
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APPENDIX B

In The

SUPREME COURT OF TENNESSEE AT KNOXVILLE

HAMILTON COUNTY LAW

No. 89

STATE OF TENNESSEE, EX REL
OTIS O'DELL, ET AL.,
APPELLEES,

v.

CITY OF CHATTANOOGA, TENNESSEE, ET AL.,
APPELLANTS.

HAMILTON COUNTY LAW

No. 90

STATE OF TENNESSEE, EX REL
ROBERT J. HICKS, ET AL.
APPELLEES,

v.

CITY OF CHATTANOOGA, TENNESSEE, ET AL.,
APPELLANTS.

PETITION TO REHEAR ON BEHALF OF APPELLEES, OTIS O'DELL, ET AL, AND ROBERT J. HICKS, ET AL

THOMAS H. O'NEAL
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ATTORNEYS FOR APPELLEES.

PETITION TO REHEAR

Come the Appellees and show to the Court that they are much aggrieved by the decision of the Supreme Court rendered in the captioned cases, and petition the Court to rehear this matter and re-examine its opinion for the following reasons:

1. As pointed out by Special Justice W. M. Leech on page 6 of the Opinion of the Supreme Court, Appellees in their brief made an erroneous statement with regard to the case of *State, Ex Rel, Cope, et al.* v. *Mayor & Board of Aldermen of the Town of Morristown*, 218 Tenn. 593, 404 SW2d 798 (1966). This statement, however, was based upon a later Morristown case, *State of Tenn., Ex Rel, Spoone* v. *Mayor & Board of Aldermen of the Town of Morristown*, 222 Tenn. 21, 431 SW2d 827 (1968), but Appellees through error cited the style of the 1966 Morristown case in lieu of the 1968 Morristown case.

Likewise, on page 10 of Appellees' brief, Appellees again through error cited the style of the earlier Morristown case when, in fact, they were relying upon the decision in the later Morristown case and fully intended to cite the later Morristown case.

Although, annexation cases should be decided not upon precedent but upon their own facts and which by their very nature cannot be identical to any other situation involving another territory of the State of Tennessee, the later Morristown case, *State of Tenn., Ex Rel, Spoone* v. *Mayor & Aldermen of the Town of Morristown*, 222 Tenn. 21, 431 SW2d 827 (1968), on which Appellees rely is relevant and similar to the Tiftonia-Wauhatchie cases and will be further discussed in Appellee's brief in support of this petition to rehear.

2. The Supreme Court, at least in its opinion, overlooked the following material fact. At the close of all of the proof, Trial Judge Boaz personally toured each of the areas proposed for annexation. A review of this portion of the trial is

difficult, if not impossible. Judge Boaz, after hearing proof for seven days, observing the demeanor and character of the witnesses coupled with a personal tour of the areas, determined that:

> ". . . There was *virtually no proof* of any relationship between the natural growth of the City of Chattanooga and the land area to the west of the city and, consequently, no proof that it would be necessary to plan the development of these areas for the future orderly development of the city. There was proof that the construction of I-24 had made these areas more easily accessible to the City of Chatanooga, but there was also proof that one of the principal arteries for transportation from this area was along the Cummings Highway which passes through a county area before getting into the areas known as Tiftonia and Wauhatchie. The welfare of the residents and property owners of Tiftonia and Wauhatchie, as well as the City of Chattanooga, would not in the Court's opinion be adversely affected if the annexation of the two areas was not consummated. In view of the above findings and after giving due consideration to the *typography* (sic) and *geographic* features of the two areas as related to the city, the annexation of Tiftonia and Wauhatchie *cannot reasonably* be justified at this time and it is the Court opinion that annexation would be *unreasonable* under the circumstances" (Emphasis Supplied)

TR 140 and 141.

For seven days, Judge Boaz heard proof of severely limiting features for development in Tiftonia and Wauhatchie, including proof that a relatively small percent of the Tiftonia-Wauhatchie area could ever be developed because of high ridges, mountainous terrain, a large island with no ingress and egress comprising a substantial portion of the Wauhatchie area, large portions of land lying within flood plains, and other limiting features including water and mountains separating the communities from the City of Chattanooga. This proof was substantiated by Judge Boaz when he personally toured the

areas after which he concluded that the annexation of both areas was unreasonable. Judge Boaz did not ignore the fairly debatable rule and specifically abided by Section 6-310 of the TENNESSEE CODE ANNOTATED, wherein his duty to determine whether or not an annexation ordinance is unreasonable is set forth.

An examination of the voluminous record in these cases will illustrate that with regard to Tiftonia and Wauhatchie the proof of the Appellant, City of Chattanooga, was nothing more than general statements and glowing phrases that annexations are good for municipalities. Appellees overwhelming carried the burden of proof that the annexation of Tiftonia and Wauhatchie is not necessary for the welfare of the residents and property owners of Tiftonia and Wauhatchie and the City of Chattanooga as a whole and, therefore, constitutes an exercise of power not conferred by law. The Tennessee Legislature provided a remedy whereby aggrieved property owners within the territories to be annexed could have their day in Court to contest the validity of the annexation and specifically set forth the duties of the Trial Judge, which were precisely followed by Judge Boaz.

On page 5 of this Court's opinion in the companion cases involving North Mountain Creek and East Brainerd, this Court stated that the remainder of the assignments can be disposed of by determining whether the Trial Judge applied the proper rule of law in passing upon the facts as he found them to be from all of the evidence. Thereafter, on page 6, this Court concluded that Judge Boaz correctly sustained the validity of the ordinances involved therein. Surely, then, if Judge Boaz understood and correctly applied the proper rule of law in the North Mountain Creek and East Brainerd cases, he understood the proper rule to be applied in the Tiftonia and Wauhatchie cases. However, Judge Boaz correctly determined in view of all of the evidence that it would be an unreasonable exercise of the legislative function delegated to the City of Chattanooga by the Legislature of the State of Tennessee to allow the annexation of Tiftonia and Wauhatchie.

3. Appellees feel that the cases involving Tiftonia and Wauhatchie were tried on a professional basis. The cases were litigated for seven days and involved the use of an expert urban planner and traffic engineer on behalf of Appellees. Never before in Tennessee has such extensive professional information been provided during the trial stages of an annexation case. The Appellants had no expert engineer or anyone from the staff of its engineering municipal consultant to testify or contradict the testimony of Appellees' engineer. The cases involving Tiftonia and Wauhatchie were not emotional attacks upon the city of Chattanooga or upon the concept of annexation. In fact, Appellees agreed that annexation is necessary at times; however, Appellees insisted and proved that there were exceptions. Such exceptions were contemplated by the Tennessee Legislature when the right was prescribed for aggrieved owners of property to challenge the validity of an annexation ordinance in the nature of a quo warranto proceeding. Again, after seven days of extensive testimony and a personal tour of the areas and months of deliberation, Judge Boaz determined that the annexation of Tiftonia and Wauhatchie was an unreasonable exercise of the legislative function delegated to the City of Chattanooga by the Legislature of the State of Tennessee.

In the interest of justice, Appellees respectfully urge the Supreme Court to go beyond the summary of general proof involving the four areas set forth in the Trial Judge's Memorandum Opinion on which this Supreme Court determined that a fairly debatable question arose, and further consider the foregoing information as well as examine the voluminous record of the trial of these cases and grant this Petition to Rehear.

Respectfully submitted,

COFFEY AND O'NEAL

By: THOMAS H. O'NEAL,
Attorney for Appellees.

[CERTIFICATE OF SERVICE OMITTED]

APPENDIX C

In The

SUPREME COURT OF TENNESSEE AT KNOXVILLE

HAMILTON COUNTY LAW

No. 89

STATE OF TENNESSEE, EX REL
OTIS O'DELL, ET AL.,
APPELLEES,

v.

CITY OF CHATTANOOGA, TENNESSEE, ET AL.,
APPELLANTS.

HAMILTON COUNTY LAW

No. 90

STATE OF TENNESSEE, EX REL
ROBERT J. HICKS, ET AL.
APPELLEES,

v.

CITY OF CHATTANOOGA, TENNESSEE, ET AL.,
APPELLANTS.

SUPPLEMENT TO BRIEF AND ARGUMENT HERETOFORE FILED ON BEHALF OF APPELLEES, OTIS O'DELL, ET AL, AND ROBERT J. HICKS, ET AL, IN SUPPORT OF PETITION TO REHEAR

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SUPPLEMENT TO BRIEF AND ARGUMENT HERETOFORE FILED

The Appellees file this supplement in support of their Petition to Rehear. Further, Appellees respectfully request this Court to re-examine its Opinion, which was based upon the finding by Special Justice Leech that the summary of the evidence copied from the Trial Judge's Memorandum shows that the question before the legislative body exercising the power delegated to it by statute raised a fairly debatable question. In order to determine whether or not a fairly debatable question is raised, the real evidence of reasonableness or unreasonableness of the annexation appearing in the record must be examined. Although Judge Boaz summarized generally the order of proof offered by Appellees and Appellants, the real evidence appearing in the record shows that the residents of Tiftonia and Wauhatchie already have those services required for their health, safety and welfare. The real evidence appearing in the record shows that Tiftonia and Wauhatchie are rural communities which have not demonstrated a growth rate of any real consequence and due to the normal growth pattern of the Chattanooga area are not expected to experience a growth of population. To thrust upon the residents of the rural communities of Tiftonia and Wauchatchie additional municipal services, most of which would simply replace services provided by the county or private enterprise is an arbitrary and unreasonable action on the part of the City of Chattanooga without first a determination being made by the City of Chattanooga in compliance fwith TENNESSEE CODE ANNOTATED, 6-309, that the prosperity of such municipality and territory will be materially retarded and the safety and welfare of the inhabitants and property thereof endangered unless it extends its corporate limits to include Tiftonia and Wauhatchie. The real evidence shows that there is absolutely no foundation whatsoever for a determination that extension of the municipal boundaries of the City of Chattanooga to include Tiftonia and Wauhatchie is necessary for the welfare of

the residents and property owners of Tiftonia and Wauhatchie as well as the City of Chattanooga. An examination of the real evidence appearing in the record will show that there was not a sufficient showing of reasonableness related to the annexation of Tiftonia and Wauhatchie to make that question at least a farily debatable one.

The importance of the function and role of a Trial Judge in a proceeding to contest the validity of an annexation ordinance cannot be over emphasized. Prior to the adoption of TENNESSEE CODE ANNOTATED, Section 6-309, the authority for a municipality to expand its boundaries by ordinance did not exist. This authority was delegated to municipalities by the Tennessee Legislature and in so doing, the Legislature prescribed limits on the authority of the municipality to annex. To prevent the abuse of such delegated authority by elected officials whose action in exercising such authority directly affects citizens who have no voice in the election of such officials, the Legislature provided in TENNESSEE CODE ANNOTATED, Section 6-310, that any aggrieved owner of property lying within territory which is the subject of an annexation ordinance may contest the validity of the annexation ordinance on the ground that it reasonably may not be deemed necessary for the welfare of the residents and property owners of the effected (sic) territory and the municipality as a whole and so constitutes an exercise of power not conferred by law. The Legislature further provided in TCA 6-310 that the question for litigation shall be whether the proposed annexation be or be not unreasonable in consideration of the health, safety and welfare of the citizens and property owners of the territory sought to be annexed and the citizens and property owners of the municipality. Having prescribed the ground on which an action in the nature of a quo warranto may be filed to contest the validity of an annexation ordinance and the question to be considered by the Trial Judge during the trial, the Legislature further directed the Court that if it finds the ordinance to be unreasonable then an order shall be issued vacating the same.

Clearly, the function of a Trial Judge in an annexation proceeding is to insure that the property owners in the effected (sic) territory are accorded due process and equal protection under the law. The role of the Trial Judge, therefore, is extremely important. Judge Boaz determined that the ordinances annexing Tiftonia and Wauhatchie were unreasonable and he vacated the same in accordance with TCA 6-310. His decision was not based solely upon the proof in the record, but upon a personal tour of the areas in question. His decision is entitled to a presumption of correctness. Judge Boaz performed the duty of a Trial Judge in an annexation proceeding in a conscientious manner. He patiently heard proof for 7 days, conducted an extensive personal tour of the areas, and thereafter determined that the annexation of Tiftonia and Wauhatchie was unreasonable and an unreasonable exercise of the legislative function delegated to the City of Chattanooga by the Legislature of the State of Tennessee. Appellees spent many hours in preparing their cases and their proof was directly related to the question of whether the proposed annexation be or be not unreasonable in consideration of the health, safety and welfare of the citizens and property owners of the territory sought to be annexed and the citizens and property owners of the municipality. This Court has never stated that its policy is to uphold the action of the municipality in all annexation proceedings. Therefore, the Appellees exercised their right to contest the validity of the annexations of Tiftonia and Wauhatchie. Judge Boaz followed the letter of the law, and in the interest of justice, this Court should re-examine its opinion and sustain the decision of the Trial Judge.

Baker v. *Carr*, 7 L. Ed. 663, prohibits a disproportion of representation to the voting population. TENNESSEE CODE ANNOTATED, 6-309, is a blatant violation of the principle enunciated in *Baker* v. *Carr*. To argue that the interests of the residents of Tiftonia and Wauhatchie are equally represented by elected officials serving on the Chattanooga City Commission due to the fact that they participated in the election of

their representative in the Tennessee Legislature which delegated its authority to extend municipal boundaries is a construction of the due process and equal protection clause of the Federal Constitution so strained beyond all reasonable limits as to be absurd. The property owners of Tiftonia and Wauhatchie did not participate in the election of the municipal officials of the City of Chattanooga, whose action of annexing Tiftonia and Wauhatchie directly affect the residents of Tiftonia and Wauhatchie and affect them more than any other people who do not reside in Tiftonia or Wauhatchie. In effect the residents of Tiftonia and Wauhatchie are being governed by elected officials, whose election they have not participated in, and in view of *Baker* v. *Carr*, clearly demonstrates an unjustifiable inequality of representation. Although the constitutionality of 6-309 has been upheld, Appellees do not believe that its constitutionality has been considered in light of *Baker* v. *Carr*. TCA, 6-309, blatantly violates the equal protection clause and due process clause of the Fourteenth and Fifth Amendment of the Federal Constitution in that it permits statutes or ordinances to be enacted by elected officials which govern or regulate a segment of the voting population who have no participation in the election of such officials. Legislative control of municipalities no less than other state power lies within the scope of relevant limitations imposed by the United States Constitution. The opposite would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivision. It is inconceivable that guaranties imbedded in the Constitution of the United States may thus be manipulated out of existence. *Baker* v. *Carr*, supra.

Appellees aver that TCA 6-309 is unconstitutional in violation of the Federal Constitution and that the ordinances passed thereunder are null and void. Appellees respectfully request this Court to declare TCA 6-309 unconstitutional and the ordinances thereunder annexing Tiftonia and Wauhatchie null and void.

Appellees again respectfully request this Court to grant their Petition to Rehear.

Respectfully submitted,

COFFEY AND O'NEAL

By: /s/ THOMAS H. O'NEAL,

Attorneys for Appelles.

[CERTIFICATE OF SERVICE OMITTED]

APPENDIX D

In The

SUPREME COURT OF TENNESSEE AT KNOXVILLE

HAMILTON COUNTY LAW

No. 89

STATE OF TENNESSEE, EX REL
OTIS O'DELL, ET AL.,

Appellees,

v.

CITY OF CHATTANOOGA, TENNESSEE, ET AL.,
APPELLANTS.

HAMILTON COUNTY LAW

No. 90

STATE OF TENNESSEE, EX REL
ROBERT J. HICKS, ET AL.

APPELLEES,

v.

CITY OF CHATTANOOGA, TENNESSEE, ET AL.,
APPELLANTS.

APPLICATION FOR SPECIAL LEAVE TO FILE SECOND PETITION FOR REHEARING

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ATTORNEYS FOR APPELLEES.

APPLICATION FOR SPECIAL LEAVE TO FILE SECOND PETITION FOR REHEARING

Come the Appellees and make application for special leave to file a second petition for rehearing in their annexation cases and respectfully request the Court for an extension of time in which to file said second petition to rehear.

Appellees will raise new issues regarding the constitutionality of the annexation statutes and ordinances passed thereunder and the action of the Supreme Court in reversing the decision of Trial Judge Boaz. Further, new questions relating to the importance of the role of the Trial Judge in an annexation proceeding and the finding by the Supreme Court that the Trial Judge did not apply to the evidence the legal test prescribed in *Morton* will be raised.

Appellees aver that an additional 15 days is required in which to file their second petition to rehear and respectfully request this Court to grant an extension of 15 days in which to file their second petition.

Respectfully submitted,

COFFEY AND O'NEAL

By: /s/ THOMAS H. O'NEAL

Attorney for Appellees.

[CERTIFICATE OF SERVICE OMITTED]